CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 175.

SIMEON HALLOWELL

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 18, 1906.

(20,492.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1907.

1 United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1906.

No. 2489.

SIMEON HALLOWELL, Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA, Defendant in Error.

The United States Circuit Court of Appeals for the Eighth Circuit, sitting in the City of St. Paul, Minnesota, on the 30th day of November, A. D. 1906, certifies that the record in the above entitled cause which is pending in such court upon a writ of error to review a judgment of conviction rendered against the plaintiff in error in the District Court of the United States for the District of Nebraska, discloses the following:

The indictment was returned November 16, 1905, and charged that the defendant, on August 1, 1905, in the District of Nebraska, introduced whiskey and other intoxicating liquors into the Indian country, "to wit, into and upon the Omaha Indian Reservation, a reservation set apart for the exclusive use and benefit of certain tribes of the Omaha Indians." The defendant entered a plea of not guilty and the case was submitted to a jury upon the following agreed statement:

"That the defendant, Simeon Hallowell, an Omaha Indian, is and was on the first day of August, 1905, an allottee of land granted to him on the Omaha Indian Reservation, in Thurston County, Nebraska; that the allotment so made to him was made under the provisions of the Act of Congress of August 7, 1882 (22 Statutes at Large, 341); that the first or trust patent was issued to him
2 in the year 1884, and that the twenty-five year period of the trust limitation has not yet expired; and that the fee title of the allotment so made to him is still held by the United States.

"That the defendant, Simeon Hallowell, on the first day of August, 1905, procured at a point outside the said reservation one-half gallon of whiskey which he took to his home, which was within the limits of the Omaha Indian Reservation, and upon an allotment which he had inherited and which allotment was made under the provisions of the act of Congress, of August 7, 1882, and the title of which is held by the Government as the twenty-five year trust period has not expired. That he took the said whiskey into and upon this allotment for the purpose of drinking and using the same himself, and that he did drink said whiskey and did give some of it to his friends or visitors to drink.

"That the said Omaha Indian Reservation has been allotted practically in whole and that many of the allotments of deceased Omaha Indians have been sold to white people, under the provisions of the Act of Congress of May 27, 1902, (32 Statutes at Large, 245, 275); that within the original boundary limits of the Omaha Indian Reser-

vation, there are many tracts of land that have been sold, under the provisions of said act, to white persons who are the sole owners thereof, and that the full title to such lands has passed to the purchaser, the same as if a final patent without restriction upon alienation had been issued to the allottee.

"That all of the Omaha Indians who were living in the year 1884, and by law entitled to allotments, received them.

"That the Omaha Indian Reservation is within and a physical part of the organized territory of the State of Nebraska, as are also the allotments herein referred to, into and upon which the said defendant took said whiskey. That the Omaha Indians exercise the rights of citizenship, and participate in the County and State Government extending over the said Omaha Indian Reservation, and over and upon the allotments herein referred to. That the defendant, Simeon Hallowell, has been on frequent occasions a Judge and Clerk of election, a Justice of the Peace, an Assessor, and a Director of the public school district in which he lives. That Omaha Indians have taken part in the State and County government, extending over the reservation, and have held the following offices in said County of Thurston, State of Nebraska: County Coronor, County Attorney, County Judge, Justice of the Peace, Constable, Road Overseer, Election officers, and have also served as jurors in the county and district Courts. Defendant is self-supporting as are most of said Indians. Some of them are engaged in business and most of them engaged in farming."

Over the defendant's objection that the matters recited in the agreed statement did not constitute or show an offense against the laws of the United States, the court instructed the jury that, if the matters so recited were true, the defendant was guilty of the offense charged. The defendant reserved an exception to this ruling. The jury found him guilty.

And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented to
3 it in said cause, that their decision is indispensable to a decision of the cause, and that to the end that such court may properly decide the issues of law so presented, it desires the instruction of the Supreme Court of the United States upon such questions, to wit:

1. After the allotment in severalty to the Omaha Indians of practically all of the lands in the Omaha Indian Reservation in the State of Nebraska and the issuance to the several allottees of the first or trust patents, under the act of August 7, 1882 (22 Stat. 341), and after the provisions of section 7 of that act and of section 6 of the act of February 8, 1887 (24 Stat. 388), had become effective as to such allottees, did Congress retain or possess the power to regulate or prohibit the introduction of intoxicating liquors upon such allotments, while the title to the same should be held in trust by the United States, or while the same should remain inalienable by the allottee without the consent of the United States?

2. Do the facts that the tribal relation of these Indians is still maintained and that part of the lands in said reservation are un-

allotted and are held by the United States for the use and benefit of the said tribe, as provided in section 8 of the said act of August 7, 1882, enable Congress, consistently with the provisions and effect of section 7 of that act and of section 6 of the said act of February 8, 1887, to regulate or prohibit the introduction of intoxicating liquors upon such allotments, while the same shall be held in trust by the United States, or while the same shall remain inalienable by the allottee without the consent of the United States?

3. As applied to allotments in severalty to Indians of lands in a State, when the land is to be held in trust for the allottee for a stated period and is then to be conveyed to him or his heirs in fee
4 and is to remain inalienable by him during such trust period without the consent of the United States, and when the effect of the allotment is to give to the allottee the benefit of and to subject him to the laws, both civil and criminal, of the State, and to make him a citizen of the United States and to entitle him to all the rights, privileges and immunities of such citizens, is that portion of the act of January 30, 1897 (29 Stat. 506), which purports to regulate the introduction of intoxicating liquors upon such allotments, while the title to the same shall be held by the United States or while the same shall remain inalienable by the allottee without the consent of the United States, a valid exercise of the power of Congress to legislate in respect of Indians or Indian lands?

4. Where, as shown by the stipulated facts, the defendant, Simeon Hallowell, an Omaha Indian, is an allottee of lands granted to him on the Omaha Indian Reservation, in Thurston County, State of Nebraska, which allotment was made to him under the provisions of the Act of Congress of August 7, 1882 (22 Statutes at Large, 351), and the first patent was issued to him in the year 1884, and the twenty-five years' period of the trust limitation fixed by said act has not expired, and the fee title of the allotment so made to him is still held by the United States; and where "the said Omaha Indian Reservation has been allotted practically in whole, and many of the allotments of deceased Omaha Indians have been sold to white people under the provisions of the Act of Congress of May 27, 1902 (32 Statutes at Large, 245, 275);" and within the original boundary limits of the Omaha Indian Reservation many tracts of lands were hitherto sold under the provisions of said act to white persons, who are the sole owners thereof, and to whom the full title to such lands has passed to the purchaser, the same as if the final patent without restriction upon alienation had been issued to the allottee; and where all of the Omaha Indians, living in the year 1884, entitled
5 to such allotments, have received the same; and where said Omaha Indian Reservation is within and a physical part of the organized territory of the State of Nebraska, as also the allotment hereinbefore referred to; and the said Omaha Indians, including the defendant, are citizens of the United States, and exercise the rights of citizenship, participating in the County and State governments extending over said Omaha Indian Reservation, and over the allotments aforesaid, the said defendant, Simeon Hallowell, having, on frequent occasions prior to 1905, held and exercised the office of

Judge, and Justice of the Peace, and Assessor in said county, where said Omaha Indians have taken part in the State and the County government extending over the Reservation, and where the defendant is self-supporting; is he liable to indictment and punishment under the act of Congress of January 30, 1897 (29 Statutes at Large, 506), for introducing intoxicating liquor, as into an Indian country, where he procured one-half gallon of whiskey at a point outside of said reservation, on the 1st day of August, 1905, which he took into and upon his allotment, within the limits of the Omaha Indian Reservation, which allotment he inherited and which was made under the provisions of said Act of August 7, 1882, the fee title to which is held by the Government, as the twenty-five years' trust period has not expired, the said whiskey having been so taken upon his allotment for the purpose of drinking and using the same himself, which he drank, giving some of it to his friends and visitors to drink?

WALTER H. SANBORN,
WILLIS VAN DEVANTER,
JNO. F. PHILIPS,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

Filed Nov. 30, 1906.
JOHN D. JORDAN, *Clerk.*

6 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify, that the foregoing certificate in the case of Simeon Hallowell, Plaintiff in Error, *vs.* The United States of America, No. 2489, September Term, 1906, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this thirtieth day of November, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

7 [Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. September Term, 1906. No. 2489. Simeon Hallowell, Plaintiff in Error, *vs.* The United States of America. Certificate of Questions to the Supreme Court of the United States. Filed Nov. 30, 1906. John D. Jordan, Clerk.

Endorsed on cover: File No. 20,492. U. S. circuit court appeals, 8th circuit. Term No. 175. Simeon Hallowell *vs.* The United States. (Certificate.) Filed December 18th, 1906. File No. 20,492.

Supreme Court of the United States.

OCTOBER TERM, 1907.

SIMEON HALLOWELL,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 175

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The record shows that one Simeon Hallowell, an Omaha Indian allottee, was indicted at the November, 1905, Term of the United States Court for the District of Nebraska for introducing liquor into the Indian Country, to-wit: the Omaha Indian Reservation in Thurston County, Nebraska. That the said indictment is based upon the authority of the Act of Congress of January 30, 1897, 29 U. S. Sts. at L. page 509.

That the defendant was allotted land upon the Omaha Indian Reservation in Thurston County, Nebraska, under the provisions of the Act of Congress of August 7, 1882, 22 U. S. Sts. 341.

That the defendant procured liquor outside the orig-

inal boundary limits of the Omaha Indian Reservation which he took upon the said Reservation, upon an allotment which had come to him by inheritance, and to which the trust title had not expired. That he drank some of it himself and gave some to his friends and visitors to drink.

The evidence shows that the whole of said Reservation has been allotted, and some tracts of land within the original boundary limits of said Reservation have been sold and title passed to white people. That the said Reservation is within and a part of the organized County of the State of Nebraska and that the Omaha Indians participate in the local county government, are voters, hold office, and that defendant has held various offices in said county organization as election officer, school officer, judge of election and justice of the peace. That the defendant has been a citizen of the United States and the State of Nebraska since the 29th day of December, 1884, and the complete jurisdiction of the State courts has been in force over said Reservation since said date. That practically all the Omaha Indians have been allotted. That in County affairs Indians have held the offices of County Judge, County Attorney, County Surveyor, County Commissioner, School Officers, Justices of the Peace, Constables, Road Overseers, and election officers, and jurors in the County and District Courts.

Plaintiff in Error was convicted and sentenced to pay a fine of $100 and costs of prosecution, and to be imprisoned in the county jail for sixty days, and until said fine and costs were paid.

ASSIGNMENTS OF ERROR.

1. That the acts charged against this defendant in the indictment found against him do not constitute a

crime against the laws and authority of the United States.

2. That the Omaha reservation, Omaha Indian Reservation in Thurston County, Nebraska, as charged in the indictment is not a place within the exclusive jurisdiction of the United States.

3. That the Court erred in giving the instruction as follows: "I assume the responsibility of saying to you that if the facts as agreed upon are true, such facts would constitute a violation of the law and the defendant would be guilty of the offense charged."

4. That the verdict, judgment and sentence are contrary to law.

5. That the Court is without jurisdiction of the offense charged in the indictment.

ARGUMENT.

It is claimed by the defendant that the territory referred to as the Omaha Indian Reservation in Thurston County, Nebraska is within the sole and exclusive police power and jurisdiction of the State of Nebraska. That the United States of America did not when the State of Nebraska was admitted into the Union, reserve any police power or jurisdiction of the territory in question, and the State of Nebraska has not granted to the United States any such jurisdiction.

That the enabling act to the people of the Territory of Nebraska was passed on April 19, 1864, and is found in Volumn 13 U. S. Statutes at Large 47. The act was passed prior to the treaty of March 6, 1865. In reference to this territory the Supreme Court of the State of Nebraska has said as follows:

"Now it is only within those particular places mentioned in the sixteenth subdivision of section eight, article one, of the federal constitution, that Congress can provide general police regulations for the government of the people. All other places are within the exclusive control of the state government, to whose legislation we must look for the punishment of all ordinary crimes and misdemeanors. From this it would seem clear that at the date of our admission into the Union, every portion of the territory within the prescribed boundaries of the State, the Indian Reservations included, became subject to its laws, and that for the punishment of all ordinary crimes, such as that under consideration, resort could alone be had to State laws, administered by State courts."

Painter *vs.* Ives, 4 Nebraska 128.

The same conclusion was reached in the case of *ex parte* Sloan in which the Court said:

"After a State has been admitted into the Union, the fact that within its boundaries land, the fee of which is in the United States, is set apart for an Indian Reservation is not enough of itself to give the United States Court jurisdiction to try a person for murder committeed within the limits of such reservation."

4 Sawyer, 330.

The effect given an enabling act as to the jurisdiction of the United States Courts over offenses committed on an Indian Reservation as it might be limited by a disclaimer of right to such lands is fully discussed in the case Draper *vs.* United States, 164 U. S. 244 where the Court says:

"As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated, The mere reservation of jurisdiction and control by the United States of 'Indian Lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses on such lands by others than Indians or against Indians."

This case approves the decision of United States *vs.* McBranty 104 U. S. 622 from which the court uses the following statement:

"Whenever, upon the admission of a State into the Union Congress has intended to except out of it an Indian Reservation, it has done so by express words."

There is no exception in the enabling act admitting the State of Nebraska and the language is much broader than that of the Montana enabling act.

The Indians within the Omaha Reservation of Thurston County, Nebraska, being allottees, they are therefore citizens, and no question can arise under that part of the Act of January 30, 1897, as to selling or giving liquor to Indians. The question is wholly as to the police power or jurisdiction of the United States over the said Reservation. The question is materially answered by this court in the case of In re Heff, wherein it is said:

"Now the act of 1897 is not a revenue statute, but plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State would be an invasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or nation and not divided between the two."

In re Reff 197 U. S. 489.

The act then is a police regulation and there is no divided sovereignty. This Court further cites and approves the case of the United States *vs.* Dewitt, 9 Wall. 41, and quotes therefrom as follows:

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where

the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation."

That the said Omaha Indians to which tribe the defendant belongs have been the objects of special legislation as to their allotments and personal status. They were allotted under the provision of the Act of Congress of August 7, 1882, 22 U. S. Stats. 341, Section 7 of which is as follows:

"Sec. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass any lay denying any Indian of said tribe the equal protection of the law."

This act of Congress gave the individual Indian of the Omaha Tribe of Indians the same rights and immunities as any other citizen. It granted to him his land, and with it and over it the benefit of the laws both civil and criminal of the State of Nebraska.

The Indian then who is a voter, citizen and wholly released from Federal wardship, and subject to only the laws of the State of which he is a resident and a citizen should not be deprived of his liberty by laws that invade the State's jurisdiction. The County of Thurston, within which the Reservation lies, was organized in the year 1889, see Cobbey's Annotated Statutes, page 1518. The Indians were allotted lands, and patents issued to them in 1884, and the Act under which plaintiff in error was convicted was not passed until January 30, 1897. The enabling act, the allotments, and the organization of the County were all legal acts long prior to the act under

which plaintiff in error was prosecuted, and convicted. The said act of January 30, 1897, is subsequent to all these rights of the State, the County and the allottee.

The latest judicial announcement as to the introducing liquor into, so-called, Indian Country, is as follows:

"The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all State legislation, and where the United States has conveyed under its land laws lands within a State ceded to it by an Indian tribe, and such lands have passed into the ownership of individuals and a municipality of the State which has been formed thereon, they are no longer subject to the provisions of Rev. St. Sec. 2139, as amended by Act Jan. 30, 1897, c. 109, 29 Stat. 506, making it an offense to introduce liquor into the Indian country; nor can that law be retained in force over such lands by agreement with the Indians in the contract or treaty of cession, the police power of the State to regulate the sale of liquor thereon being exclusive."

In re Dick 141 Fed. 5.

The liquor traffic is under the control and regulation of State laws. The State of Nebraska has provided punishment for the violation of its liquor laws, and the Indian citizen the same as other citizens, should be subject to only one sovereign jurisdiction and power.

The Act of Congress of January 30, 1897, in one complete act declares against the sale of liquor to Indians, and against the introducing of liquor into the Indian Country. It is the same as the laws preceeding it, except that it enlarges the said acts by definition. With the exceptions named it is the identical statute as Section 2139 of the Revised Statutes, and the Act of Congress of March 15, 1864.

Chap. XXXIII. An Act to Amend an Act, Entitled "An Act to Regulate Trade and Intercourse with Indian

Tribes, and to Preserve Peace on the Frontiers," Approved June 30, 1834.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the twentieth section of the act "Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers," approved June 30, 1834, be, and the same is hereby, amended so as to read as follows, to-wit: "Sec. 20. And be it further enacted, That if any person shall sell, exchange, give, bargain, or dispose of any spiritous liquors or wine to any Indian under the charge of any Indian Superintendent or Indian Agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person on conviction thereof, before the proper district or circuit court of the United States, shall be imprisoned for the period not exceeding two years, and shall be fined not more than three hundred dollars: *Provided,* however, that it shall be a sufficient defence to any charge of introducing or attempting to introduce liquor into the Indian country if it be proved to be done by order of the War Department, or any officer duly authorized thereunto by the War Department. And if any Superintendent of Indian Affairs, Indian Agent, or Sub-agent, or Commanding Officer of the Military Post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spiritous liquor or wine into the Indian country in violation of law, it shall be lawful for such Superintendent, agent, sub-agent, or commanding officer, to cause the boats, stores, packages, wagons, sleds, and places of deposits of such persons to be searched; and if any such liquor be found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against, by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a traitor, his license shall be revoked and his bonds put in suit. And it shall moreover be the duty of any person on the service of the United States or for any Indian, to take and

destroy any ardent spirits or wine found in the Indian country except such as may be introduced therein by the War Department. And in all cases arising under this Act Indians shall be competent witnesses. Approved March 15, 1864.

13 U. S. Statutes at Large 29.

An Act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and other purposes.

That any person who shall sell, give away, dispose of, exchange or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, AND ANY PERSON WHO SHALL INTRODUCE, OR ATTEMPT TO INTRODUCE, ANY MALT, SPIRITUOUS, OR VINOUS LIQUOR, INCLUDING BEER, ALE, AND WINE, OR ANY ARDENT OR INTOXICATING LIQUOR OF ANY KIND WHATSOEVER INTO THE INDIAN COUNTRY, WHICH TERM SHALL INCLUDE ANY INDIAN ALLOTMENT WHILE THE TITLE TO THE SAME SHALL BE HELD IN TRUST BY THE GOVERNMENT, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense, thereafter: *Provided, however*, That the person convicted shall be committed until fine and costs are paid.

29 Stats. 506.

This last Act of January 30, 1897, provides that the term Indian shall include allottees, and the term Indian country shall include any Indian allotment while the title

to the same shall be held in trust by the government. Aside from these enlargements there is no substantial difference and the Act of March 15, 1864, which act is entitled an Act to Amend an Act to Regulate Trade and Intercourse with Indians, and to Preserve Peace on the Frontier.

These acts are in *pari materia* and it seems to counsel that, under which ever theory the law may be considered, it does not apply to the conditions of this case. Under the theory of regulating trade and intercourse with Indian tribes it does not apply because the defendant allottee is a citizen of the United States and not subject to such limitation. Under the theory that the Indian ward of the Government should be protected against the liquor traffic we again come to the fact that the defendant allottee is a citizen and not a ward.

The Act of January 30, 1897, it seems to counsel, stands upon one or the other of these theories and can only be sustained upon ground that the Indian is a ward, or the land in question is within the exclusive jurisdiction of the United States. Neither is true in this case.

The Court has said:

"Now the act of 1897 is not a revenue statute, but plainly a police regulation."

In re Heff, 197 U. S., 505.

This statement was made in considering the sale of liquor to an Indian allottee who was a citizen. It was made after due consideration of the changed conditions of the Indians and that as citizens they were not subject to police regulations within the States concerning the liquor traffic. The theory and purpose of this Act is to protect the Indian Ward and under the authority of the

United States to regulate trade and intercourse with the Indian tribes. It is a police regulation which belongs to the jurisdiction of the State of Nebraska, and which State provides a punishment of any illegal traffic in liquor within the territory described as the Omaha Indian Reservation in Thurston County, Nebraska.

The fact that the first part of the Act is declared unconsitutional in its application to citizen Indians brings into consideration what effect it has upon the remaining part thereof. The history of the Act is that the part upon which the defendant was indicted is based upon the same theory, and is an incident to the main purpose of regulating trade with the Indian tribes and protect the wards of the Government. Being an incident to the main purpose it falls with it. As a police regulation of the liquor traffic it can have no effect within the boundaries of the State of Nebraska.

The principle contended for by the Solicitor-General is not denied. The United States has the power as set forth in the cases of McKay *vs.* Klayton (204 U. S., 458), and United States *vs.* Rickett (188 U. S., 436), for in those cases the State authorities by legal process were attempting to affect the title which rests in the United States Government. Where such title exists it can only be affected by the courts of the United States, and no action of the State can abridge, limit or affect the title of the United States.

The case of Camfield *vs.* United States (167 U. S., 518), it seems to counsel comes nearer an expression of the principle claimed by the Solicitor-General to be involved in this case. The Court, speaking by Justice Brown, said:

"The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."

Counsel does not deny this right or power of the United States, but claims that it has no application to this case. The defendant is indicted under a law which is based upon the right of the United States to Regulate trade and intercourse with Indians and to protect the wards of the Government. This Court has said:

"In this Republic there is a dual system government. National and State. Each within its own dominion is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of police power. And so far as it is an exercise of the police power it is within the domain of the State jurisdiction. It is true the national government exacts licenses as a condition of the sale of intoxicating liquors, but it is solely for the purposes of revenue and is not attempted exercise of the police power. A license from the Unitd States does not give the licensee authority to sell liquor in a State whose laws forbid its sale, and neither does a license from a State to sell liquor enable the licensee to sell without paying a tax and obtaining the license required by the Fedral Statute. *Now the act of 1897 is not a revenue statute, but plainly a police regulation.*"

In re Heff, 197 U. S. 505.

A law which is a police regulation is not the exercise of a proprietary right of property. The law under which the defendant is indicted is not one affecting a trespass

upon the land of which the Government is the owner. Neither is the defendant a trespasser upon the land. He is there as the owner of the possession, and benefit while the Government holds the title for him. His being there is not adverse to the Government but in accordance with the law granting to the defendant the sole use and benefit and ultimate complete title of the land in question.

In this case the defendant is not one who is or can be charged with having indulged in the liquor traffic. He has kept liquor at his home for the same purposes that many other worthy people keep it. For reasonable use by himself and family and for a social drink with his friends. Counsel admits, however, that if the law prohibiting the taking of liquor into the Indian country is the exercise of the proprietary right of the United States as an owner of the land, and not a police regulation of the liquor traffic, then the defendant should be held otherwise not.

The Act of March 15, 1864, and subsequent acts, including the Act of January 30, 1897, are in *pari materia*. Construing them together, we find them to be a police regulation of the liquor traffic.

Sec. 43. Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purpose of construction considered as forming one homogeneous and consistent body of law.
Endlich on the Interpretation of Statutes.

The exclusion of liquor from the Indian Country was an incident in preventing the traffic with tribal Indians. There is now no such control of traffic with Indians of the class to which defendant belongs, and there is now no reason for the exclusion of liquor consistent with the intention of Congress when this act was passed.

The House of Representatives Report No. 1209 shows that the sole purpose of the bill was to prevent the liquor traffic with Indians.

The right of the United States to protect its property by any regulation Congress may see fit to enact is not denied.

There is nowhere shown an intent to violate such a law or right of the United States. The distinction seems to follow the statement of this Court, by Justice Brewer:

"There is no suggestion in the present case of a violation of an internal revenue law of the nation, but the conviction is sought to be upheld under the Act of 1897, a mere statute of police regulation."

In re Heff, 197 U. S., 507.

As a police regulation the statute of January 30, 1897, is unconstitutional in its application to the defendant.

In this contention counsel for defendant desires to call attention of the court to the fact that in the three cases before this court at this term involving the Act of January 30, 1897, each of the plaintiffs in error is an Indian. In the State of Nebraska, ninety-seven per cent of the prosecutions are against Indians. The whites who engage in the liquor traffic, under licenses from the State and Federal Governments, enjoy the profit, and the law intended for the protection of the Indian has become the means of his oppression. The trouble with the Chippewas, of Minnesota, was traced to their prosecution under the liquor law.

To counsel it appears that in the application of the principles of protection to the Indian that he is suffering the greatest wrongs through the means provided for his protection. Not only is he subject to arrest, fines and

imprisonment, under a law intended to punish white persons engaged in a debauching liquor traffic, but he is swindled of his property by some of those paid as government employees to protect him.

The liquor traffic among the Omaha Indians is not as bad as it was some years ago, and it is due to an improvement and development among the Indians themselves.

The Omaha Indians after being citizens for twenty-one years had a Court of Indian Offences established among them. By this means they were deprived of their liberty and property and had their lives threatened. In a high-handed and arbitrary manner they were placed in jail and fined. The so-called Agent was prosecutor, Court, and executioner. This continued until the Federal Court for the District of Nebraska released an Indian by allowing a writ of *habeas corpus*, and declared the Court to be without any legal existence. The money wrongfully taken from these Indians has been returned to them.

The Indian of to-day hedged about by rules and regulations and an unceasing end of red tape and officialdom is less a man than the old Indian who developed through the necessities of his condition. The protection has grown into burden and ripened into oppression.

It seems to counsel that twenty-three years of citizenship should bring about a position where the Indian ceases to be a special object of the law, and his rights are protected the same as other men's rights. When he shall not be over-protected.

Relying upon the announcement of this Court that the Act of Congress of January 30, 1897, is purely a police regulation, and upon which the questions of this case are

certified, it is the conviction of counsel that they should be answered in the negative.

Respectfully submitted,

THOMAS H. SLOAN,

Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

SIMEON HALLOWELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 175.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The facts of this case are set forth in the certificate. Briefly stated, Hallowell was convicted in the District Court, Nebraska, of introducing liquor upon an allotment of land in the Omaha Reservation while the title thereto remained in trust in the United States, and appealed from the judgment and sentence imposed to the Circuit Court of Appeals.

The act of Congress of January 30, 1897 (29 Stat., 506), upon which the indictment was founded, provides:

> That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating

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liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, *and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government,* or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided, however,* That the person convicted shall be committed until fine and costs are paid. * * *

Several questions are propounded by the Circuit Court of Appeals, but all may be resolved into the single one, whether Congress had authority to make it an offense to introduce liquor upon an Indian allotment while the title thereto remained in trust in the United States.

The act of August 7, 1882 (22 Stat., 341), under which the Omaha Reservation has been allotted, provides:

> CHAP. 434. An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.
>
> SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is, authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation each bona fide settler occupying

any portion of said lands and having made valuable improvements thereon, or the heirs-at-law of such settler, who is a citizen of the United States or who has declared his intention to become such, shall be entitled to purchase, for cash, through the United States public land-office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act; * * *

* * * * *

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; *which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March*

sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided,* That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who, being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further,* That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, *which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and*

benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs, according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees each and every member of said tribe of Indians shall have the benefit of, and be subject to, the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe

of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That from the residue of land thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: *Provided*, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation, either east or west of said right of way mentioned in the first section of this act.

Article 4 of the Omaha treaty of March 6, 1865 (14 Stat., 667), provided:

> ARTICLE IV. The Omaha Indians being desirous of promoting settled habits of industry

and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land, to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without

the written permission of the Superintendent of Indian Affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned, respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture until otherwise provided for by Congress.

The act of May 30, 1854 (10 Stat., 277), organizing the Territories of Nebraska and Kansas, provided (sec. 1):

> That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the bounda-

ries, and constitute no part of the Territory of Nebraska, until said tribe shall signify their assent to the President of the United States to be included within the said Territory of Nebraska, or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed.

The Omaha reservation does not appear to have been excluded by an act or treaty from the territorial limits or jurisdiction of the State.

The act enabling the people of Nebraska to form a constitution and State government, approved April 19, 1864 (13 Stat., 47), provided (sec. 4):

> That said constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States:
>
> * * * * *
>
> Third. That the people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without the said State shall never be taxed higher than the land belonging to residents thereof, and that no taxes shall be imposed by said State on lands or property therein belonging to or which may hereafter be purchased by the United States.

The constitution adopted by the people of Nebraska provided, Article XI (Gen. Stat, Nebr., 1873, p. 66):

> SEC. 6. This constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original States on the condition and faith of the terms of the propositions stated and specified in an act of Congress approved April nineteenth, 1864, authorizing the people of the Territory to form a constitution and State government, the people of the State of Nebraska hereby accepting the conditions in said act specified.

ARGUMENT.

I.

At the outset it is proper to say that the Government does not deny that the plaintiff in error, under the decision of this court in the *Matter of Heff*, 197 U. S., 488, having received an allotment and trust patent in pursuance of the act of Congress of August 7, 1882 (22 Stat., 341), is a citizen of the United States and of the State, by virtue of the provisions of section 6 of the general allotment act of February 8, 1887 (24 Stat., 388), as it stood prior to the passage of the amendatory act of May 8, 1906 (34 Stat., 182), and subject to the jurisdiction of the State of Nebraska in matters of general police.

The jurisdiction of the United States is based, not upon any supposed authority over the Indian, as an Indian, but upon its jurisdiction over the lands in question.

It is contended that lands allotted to Indians, so long as the title remains in trust in the United States, may be protected by the Government against trespass and intrusion; and that it is competent for Congress, as it has done in the act of January 30, 1897, to make it an offense to introduce liquor thereon. This provision of that act, it is to be observed, is separable and distinct from that as to the sale of liquor to Indian allottees held unconstitutional in the Heff case.

An Indian allottee is in no worse or better position than if he were a white or a black man. It matters not under the law what may be the residence or the civil status of a defendant. The statute applies to *any* person who shall introduce intoxicating liquor upon a trust allotment.

The lands originally occupied by the Omahas, including those in question, were not excluded by any act or treaty from the jurisdiction of the State of Nebraska; consequently upon its admission they became a part of the territory of the State and embraced within its jurisdiction.

> *Langford* v. *Monteith*, 102 U. S., 145, 147.
> *United States* v. *McBratney*, 104 U. S., 621, 623.
> *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S., 525.
> *Utah & Northern Railway* v. *Fisher*, 116 U. S., 28.

But while this is so, it is equally well settled—and the cases cited recognize the fact—that the jurisdiction of the State over lands of the United States within its limits is subordinate to the jurisdiction of the United States to protect its property and administer its institutions, and can not be so exercised as to interfere with the constitutional authority of the Federal Government.

An examination of the cases cited will show that all this court has ever held was that the State had jurisdiction of individuals or the property of individuals or corporations on lands of the United States so situated. It has held that the State could tax

the property of corporations on such lands (*Fort Leavenworth R. R. Co.* v. *Lowe* and *Utah & Northern Railway* v. *Fisher, supra*), and that the State had jurisdiction of crimes committed by white men upon white men thereon (*United States* v. *McBratney, supra*). But it has never held that the State could tax the lands themselves or interfere with the control of the United States over them.

On the contrary, this court has distinctly held that the lands of the United States within a State are not subject to taxation by the State (*Van Brocklin* v. *State of Tennessee*, 117 U. S., 151, 155), and that the power vested by the Constitution in Congress, "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Art. IV, sec. 3), "*implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise.*" (*Railroad Co.* v. *Price County*, 133 U. S., 496, 504.)

In *Gibson* v. *Chouteau* (13 Wall., 92), the court, speaking by Mr. Justice Field, said (p. 99):

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. *That power is subject to no limitations.* Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise.

In *Jourdan* v. *Barrett* (4 How., 16), the court said (p. 185):

> By the Constitution Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States;" for the disposal of the public lands, therefore, in the new States, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; *so Congress may prohibit and punish trespassers on the public lands.*

Congress has made it an offense against the United States to cut timber on the public lands. (Revised Statutes, sec. 2461; id., sec. 5388, as amended by act of June 4, 1888, 25 Stat., 166.) The latter section, as amended, covers the cutting or destruction of "any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or other lands belonging to or occupied by any tribe of Indians under authority of the United States."

Provisions for the protection of trees, fences, etc., on lands of the United States, and for the protection of such lands from trespass by cattle, etc., and prescribing penalties for violations thereof, are contained in the act of March 3, 1875, chapter 151 (18 Stat., 481).

In *Camfield* v. *United States* (167 U. S., 518), the police power of the United States over the public lands in the States was expressly asserted. That case

involved the constitutionality of the act of Congress of February 25, 1885, chapter 149, entitled "An act to prevent unlawful occupancy of the public lands." In upholding the act, the court, speaking by Mr. Justice Brown, said (pp. 525–526):

> *The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.* If it be found to be necessary *for the protection of the public, or of intending settlers,* to forbid all inclosures of public lands, the Government may do so, *though the alternate sections of private lands are thereby rendered less available for pasturage.* The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, *we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection.* A different rule would place the public domain of the United States completely at the mercy of State legislation.

It is manifest, therefore, that even where lands or other property of the United States are within the

jurisdiction of the State the rights of the Federal Government in regard thereto are very different from those of the ordinary proprietor. For a trespass upon his property the individual is relegated to a civil action, and must look to the State for police protection. But the United States is not dependent upon the State governments for such protection. This court has held it "to be an incontrovertible principle that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." (*Ex parte Siebold*, 100 U. S., 371, 395.)

In that case the court, after stating the principle just quoted, said:

> This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both can not be executed at the same time. In that case the words of the Constitution itself show which is to yield. "This Constitution and all laws which shall be made in pursuance thereof * * * shall be the supreme law of the land."

To the same effect are *In re Neagle* (135 U. S., 1); *In re Debs* (158 U. S., 564). See also *Ohio* v. *Thomas* (173 U. S., 276), in which it was held that the State

could not, in the exercise of its police powers, interfere with the administration of a National Soldiers' Home within its limits and general jurisdiction.

It is clearly, therefore, within the competency of Congress to forbid and punish trespasses upon the lands of the United States within the limits and jurisdiction of the State.

It is equally manifest that it is for Congress to determine what shall constitute a trespass—what shall be permitted to be taken upon said lands and what shall be excluded therefrom.

There is nothing to differentiate the public lands in Nebraska from those in other States, so far as concerns the control of the Federal Government over them.

II.

If lands allotted to the Indians, including those in the Omaha Reservation, are, during the trust period, in the same category as other public lands of the United States, the authority of the Federal Government to prohibit and punish the introduction of liquor thereon is unquestioned. That, so long as the title thereto is held in trust by the Government, they are in practically the same position as other public lands is clear. They can not be taxed by the State during the trust period, because the tax would be in effect upon the property of the United States. (*United States* v. *Rickert*, 188 U. S., 432.) Not until the legal title passes out of the United States do they cease to be the property of the United States or pass beyond its control.

The fee to the lands of the Indian tribes has always been in the Government, subject only to the Indians' right of occupancy.

Johnson v. *McIntosh*, 8 Wheat., 543, 588.
Beecher v. *Wetherby*, 95 U. S., 517, 525–526.
Spalding v. *Chandler*, 160 U. S., 394, 402, 403.

The fact of the allotment of such lands and the issuance of a trust patent therefor, does not divest the United States of the fee; consequently it still has proprietary control over them. Referring to section 5 of general allotment act of February 8, 1887, which authorized the issuance of trust patents to allottees, the court in the Rickert case said (188 U. S., 436):

> The word "patents," where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The "patents" here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing designed to show that for a period of twenty-five years the United States would hold the land allotted in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or incumbrance. *In other words, the United States retained the legal title*, giving the Indian allottee a paper or writing, improperly called a patent,

> showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void. So that the United States retained its hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine.

In *United States* v. *Gardner* (133 Fed. Rep., 285) the Circuit Court of Appeals for the Ninth Circuit held, as stated in the head-note:

> Lands allotted to Indians in severalty subject to the conditions imposed by the general allotment act of February 8, 1887 (c. 119, 24 Stat., 388), which provides that the United States shall hold such lands in trust for the allottee or his heirs for the period of twenty-five years, or so much longer as the President may determine, and then convey the same in fee to such allottee or his heirs, and that any conveyance or contract touching the same made before the expiration of such period shall be absolutely null and void, remain the property of the United States during such trust period, and it may maintain an action for timber unlawfully cut therefrom by a third person.

In *United States* v. *Thurston County* (143 Fed., 287) the Circuit Court of Appeals for the Eighth Circuit,

which certifies this case, held that the allotted lands of the Omaha reservation were exempt from taxation by the State or county during the trust period, because they were instrumentalities lawfully employed by the nation to protect, support, and instruct the Indians.

The interest of the United States in lands held in trust for the Indians was considered in *Minnesota* v. *Hitchcock* (185 U. S., 373, 387–388), where it was held that the United States was the real party in interest in a suit against the Secretary of the Interior concerning them.

In *McKay* v. *Kalyton* (204 U. S., 458), decided at the last term, the exclusive authority of Congress over Indian allotments while the same were held in trust by the Government was again asserted, and the Heff case held not to be inconsistent therewith. The court said (p. 466):

> The supervisory power possessed by the United States over allotted lands while the title remains in the United States was pointed out in the opinion in *United States* v. *Rickert, supra*, a case which came to this court upon questions certified from a Circuit Court of Appeals. * * * It was decided, in view of the object to be accomplished by allotting Indian lands in severalty, that it was not within the power of a State to tax either the permanent improvements made on allotted lands or the personal property consisting of cattle, horses, and other property of like char-

> acter which might be furnished to Indians for use upon such land. And, answering a question as to whether the United States had such an interest in the controversy or in its subjects as entitled it to maintain the suit, the court declared (p. 444) that no argument to establish that proposition was necessary. Nor are the principles which were thus announced as to the nature and character of an allotment of Indian lands and the interest of the United States therein as trustee before the expiration of the period for their final disposition in any way affected by the decision In the *Matter of Heff* (197 U. S., 488), dealing with the subjection of allottee Indians in their personal conduct to the police regulations of the State of which they had become citizens.

The Heff case proceeds on the theory that the Indian, as a person, when he becomes a citizen of the United States and of the State, has the same civil and political status as a citizen not an Indian.

The law prohibiting the introduction of liquor has no concern with the civil or political status of the violator. It has regard only for the protection of lands held in trust by the nation for certain Indians from the intrusion and trespass of parties who seek to introduce thereon that which is considered subversive of the Government's policies.

The fact that there are within the limits of the Omaha Reservation lands which have been sold and deeded to white people, under the act of Congress of May 27, 1902 (32 Stat., 245, 275), authorizing

the sale and conveyance in fee of inherited Indian lands, manifestly does not affect the power of Congress to protect the lands to which it still retains the fee.

The introduction of liquor on these allotments is not only a menace to the Indians themselves, but, as has been the experience of all communities, tends to diminish the value of such lands. But even if it were otherwise, it is, as already stated, for the Government itself to determine what shall constitute a trespass upon its property. The language of the court in *Camfield* v. *United States* (167 U. S., 513), above quoted, indicates the broad discretion which the General Government has in this respect. The court there says that the power of the United States to protect its lands is to be measured by the exigencies of the particular case, and may be exercised for the benefit of the public or of intending settlers, even at the cost of inconvenience or damage to individuals. The fact, therefore, that the exclusion of liquor from Indian allotments may be for the ultimate benefit of the allottees can not invalidate this exercise of the Federal police power.

The court will observe that in the first three questions certified by the Circuit Court of Appeals the proposition made is whether the act of Congress of January 30, 1897, is valid in respect to allotments made under the act of August 7, 1882, "while the title to the same should be held in trust by the United States, *or* while the same should remain inalienable

by the allottee without the consent of the United States."

It is submitted that the use of the latter phrase, "or while the same should remain inalienable without the consent of the United States," is improper and should be disregarded, as no such question is presented by the case stated in the certificate, nor does it arise under the act of August 7, 1882. There are allotment acts or treaties under which allotments are patented in fee to the allottee with a restriction only upon its alienation by the allottee without the consent of the United States. In such a case it might be contended that the title being in the allottee (*Libby* v. *Clark*, 118 U. S., 250, 255; *Schrimpscher* v. *Stockton*, 183 U. S., 290, 299; *Lykins* v. *McGrath*, 184 U. S., 169, 171), the United States had no such interest in the lands as would enable it to forbid the introduction of liquor thereon. But we have not that case here.

By the act of August 7, 1882, section 6 (22 Stat., 341, 342), and the trust patent or certificate issued in pursuance thereof, the United States reserves the title to the lands allotted for the period of twenty-five years. The further inhibition upon the conveyance of the lands allotted, or the making of any contract in regard thereto, during the trust period, and the nullification of all such conveyances and contracts, emphasizes the intention of Congress that during that period, save for the right of occupancy in the allottee, the lands should be absolutely under its control.

It is respectfully submitted, therefore, that so much of the first three questions certified as bear

upon the power of Congress to forbid the introduction of liquor upon an Indian allotment while the title thereto remains in trust in the United States should be answered in the affirmative, and that the fourth question should also be answered affirmatively.

HENRY M. HOYT,
Solicitor-General.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

SIMEON HALLOWELL,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.
} No. 175

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit

ADDITIONAL BRIEF OF PLAINTIFF IN ERROR

The territory named in the indictment as the Omaha Reservation, in Thurston County, Nebraska, is a part of the Indian country which was ceded to the United States under the treaty of March 16, 1854, 10 Stats., 1043. After the cession to the United States the Omahas, being disatisfied with the country they had reserved, selected 300,000 acres of land of the ceded country at the place known as the Blackbird Hills, which selection included country described in the indictment, and was approved by the Secretary of the Interior on the 11th day of May, 1855.

At the time the State of Nebraska was admitted into the Union the lands occupied by the Omaha tribe of Indians was

not Indian country within the meaning of that term as used in the Indian trade and intercourse Act of June 30, 1834, and as since defined in the following cases: U. S. *vs.* LeBris, 121 U. S., 278; *Ex parte* Crow Dog, 109 U. S., 566; Bates *vs.* Clark, 95 U. S., 204.

At no time since the admission of the State of Nebraska has it relinquished to the United States any jurisdiction over the country occupied by the Omaha tribe of Indians.

This claim stands clearly admitted by the Solicitor General in the Government's brief, at page 13, in the following language:

> "The lands originally occupied by the Omahas, including those in question, were not excluded by any act or treaty from the jurisdiction of the State of Nebraska; consequently, upon its admission they became a part of the territory of the State and embrace dwithin its jurisdiction.
>
> "Langford *vs.* Monteith, 102 U. S., 145, 147.
> "United States *vs.* McBratney, 104 U. S., 621, 623.
> "Fort Leavenworth R. R. Co. *vs.* Lowe, 114 U. S., 525.
> "Utah & Northwestern Railway *vs.* Fisher, 116 U. S., 28."

With this admission, the Act of January 30, 1897, stands alone in its application to the defendant. In the allotment Act of August 7, 1882, which was a special act in reference to the Omaha Indians, and by which the reservation was allotted and a portion sold the Omahas as a condition depending upon the allotment were made subject to the civil and criminal laws of the State of Nebraska. The Omahas were not then within the jurisdiction of any courts. The jurisdictional part is as follows:

> "SEC. 7. That upon the completion of said allotments, and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall

> have the benefit of, and be subject to, the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law."

By this Act the Omaha Indians as a tribe were made subject to the laws of the State of Nebraska and they and the territory are thereby subject to the police regulations of the State.

The Solicitor General, while admitting the jurisdiction of the State claims, on page 13 of brief, the right of the Government to protect its property, stating:

> "But while this is so, it is equally well settled—and the cases cited recognize the fact—that the jurisdiction of the State over the lands of the United States within its limits is subordinate to the jurisdiction of the United States to protect its property and administer its institutions, and cannot be so exercised as to interfere with the constitutional authority of the Federal Government."

This right of the Federal Government is admitted. But it is claimed that the prosecution of a citizen under a police regulation promulgated to control the trade and commerce of Indian tribes is not within the principle growing out of the right to protect property.

In reference to the Omaha tribe of Indians the right of the Federal Government to regulate trade and commerce with tribes of Indians or the individuals thereof has ceased. With it has passed the reason and the right to control such trade and commerce by a police regulation. The reason and right to enforce such regulations has passed, and with the passing of the principle the incidents to aid and support the same have also passed. The right as owner to protect property is not the same as that to protect a people within a prescribed class. The right of the

Government to protect property cannot be maintained under a statute enacted for a wholly different purpose.

To counsel for defendant it seems that without some additional legislation extending the jurisdiction of the liquor law or police regulation of January 30, 1897, so as to make it a property qualification that it fails as against this defendant and the Solicitor General admits that there is nothing.

Under these circumstances it is urged that the defendent is not within the statute. The following principle applies:

> "The elementary rule is that penal statutes must be strictly construed, and it is essential that the crime punished must be plainly and unmistakably within the statute."
>
> Bellew *vs.* U. S., 160 U. S., 197.

> "Before a man can be punished, his case must be plainly and unmistakably within the statute."
>
> U. S. *vs.* Brewer, 139 U. S., 278.

It is the claim of the defendant that the Act of January 30, 1897, is a police regulation. That it is based wholly upon the individual status of the Indian and in no way a territorial jurisdiction standing by itself alone. The authority for the Act, its history and the decisions applying thereto confirm and establish that fact beyond a reasonable doubt.

The most comprehensive of the earlier acts of Congress in reference to the liquor traffic among Indians is that of June 30, 1834, which is generally known as the Indian Trade and Intercourse Act. Section twenty of this Act was wholly in reference to the liquor traffic with Indians and the introduction of liquor into the Indian country. By another section of the same act the Indian country was designated. The Court has said:

"Indian country, within the meaning of Section 2139, since the Revised Statutes went into effect. * * * That section is a re-enactment in part of Section 20 of the Act of June 30, 1834, as amended by the Act of March 15, 1864. * * * The re-enacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested."

U. S. *vs.* LeBris, 121 U. S., 278.

"Section 2139, as amended and re-enacted in 1892, makes it an offense against the United States for any one to introduce intoxicating liquors into the "Indian country," and the offense charged against Dick was the introduction by him of whiskey into that country on the 15th day of March, 1905. * * * If this case depended alone upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for the statute, when enacted, did not intend by the words "Indian country" to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the State, for all purposes of Government, was full and complete."

Dick *vs.* U. S., No. 62, October term, 1907, page 6.

"But it is contended that although the United States may not punish under the police power the sale of liquor within a State by one citizen to another it has the power to punish such sale if the purchaser is an Indian. And the power to do this traced to that clause of Section 8, Article 1, of the Constitution, which empowers Congress 'to regulate commerce with foreign nations, and among the several States, and with Indian tribes.' It is said

that the commerce with the Indian tribes includes commerce with the members thereof, and Congress having the power to regulate commerce between the white men and the Indians, continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the State and shall be a citizen of the United States, and therefore a citizen of the State." * * * "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, it gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State; it places him out side the reach of police regulations on the part of Congress."

In re Heff, 197 U. S., 488.

These decision of this Court show the source of the said Act of January 30, 1897, and the Constitutional provision upon which it stands. It is the status of the Indian, taken either collectively as a tribe or as an individual member of a tribe, that brings him within the law and the Constitutional provision upon which it rests.

The sale of liquor to an Indian, who was a ward of the Government or under the charge of an Indian Agent, has been sustained at distances remote from Indian country. This right to control, by the Federal Government, of traffic prohibited by law with Indians is not limited by any boundary, but is co-extensive with the limits of the United States, and going back to the Constitutional right and authority therefor we find it resting upon the status of Indians as tribes. The exclusion of liquor from the "Indian Territory" was and is an incident to the regulation of trade and intercourse with Indian tribes or the individual members thereof. The defendant as a tribal Indian passed out of existence with issuance to him of a patent in the year 1884, and there then was brought into being

a citizen of the United States and the State of Nebraska subject fully, wholly and completely to the jurisdiction of the said State of Nebraska.

With the passing of this status of the defendant, as a tribal Indian, also passed the right of the United States to enforce police regulations against him growing out of and based upon that former status. The defendant CITIZEN is not within the Constitutional provision.

Respectfully submitted,

THOMAS L. SLOAN,
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